

**MILMAN LABUDA LAW GROUP PLLC**

3000 MARCUS AVENUE  
SUITE 3W8  
LAKE SUCCESS, NY 11042

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TELEPHONE (516) 328-8899  
FACSIMILE (516) 328-0082

April 8, 2024

**VIA ECF**

United States District Court  
Eastern District of New York  
Attn: Hon. Cheryl L. Pollak, U.S.M.J.  
225 Cadman Plaza East  
Courtroom 13B South  
Brooklyn, NY 11201-1804

**Re: Williams v. The Russo's Payroll Group, Inc., et al.**  
**Case No.: 1:21-cv-2922 (EK) (CLP)**  
**MLLG File No.: 75-2021**

Dear Judge Pollack:

This office represents Defendants in the above-referenced case. Defendants submit this letter in opposition to Plaintiff's March 27, 2024 letter seeking an Order permitting Plaintiff to depose non-party witness, Phillip Montane ("Mr. Montante") (ECF Doc. No. 64). Plaintiff's request should be denied because he untimely served a subpoena on Mr. Montante for his deposition to occur after the January 15, 2024 deadline ordered by the Court in its November 28, 2023, Scheduling Order.

Plaintiff served a subpoena on Mr. Montante on March 5, 2024, almost two (2) months after the January 15, 2024 close of discovery set in the November 28, 2023 Scheduling Order, (ECF Docket No. 52). Service of a subpoena after the close of discovery is generally improper: "parties may not issue subpoenas 'as a means to engage in discovery after the discovery deadline has passed.'" Agapito v. AHDS Bagels, LLC, 2018 U.S. Dist. LEXIS 83403 (S.D.N.Y. May 17, 2018); see also McKay v. Triborough Bridge & Tunnel Auth., No. 05 Civ. 8936, 2007 U.S. Dist. LEXIS 81722, 2007 WL 3275918, at \*2 (S.D.N.Y. Nov. 5, 2007) (quoting Dodson v. CBS Broad. Inc., No. 02 Civ. 9270, 2005 U.S. Dist. LEXIS 30126, 2005 WL 3177723 (S.D.N.Y. Nov. 29, 2005)). "[W]hen a party is aware of the existence of documents before the discovery cutoff date and issues discovery requests including subpoenas after the discovery deadline has passed, then the subpoenas and discovery requests should be denied." Id.; see also Revander v. Denman, No. 00 Civ. 1810, 2004 U.S. Dist. LEXIS 628, 2004 WL 97693, at \*1 (S.D.N.Y. Jan. 21, 2004) (quoting McNerney v. Archer Daniels Midland Co., 164 F.R.D. 584, 588 (W.D.N.Y. 1995)) (alteration and quotation marks omitted). Therefore Plaintiff's subpoenas must be quashed.

As Defendants previously informed the Court in their Reply in Opposition to Plaintiff's Motion to Enforce Compliance dated February 21, 2024 (Defendants' "Reply") (ECF Doc. No. 62), Plaintiff scheduled depositions of non-party witnesses significantly past the January 15, 2024 deadline established by the Court in the November 28, 2023, Scheduling Order. This time,

however, Plaintiff subpoenaed Mr. Montante to appear for his deposition more than six-weeks after the January 15, 2024 deadline. Therefore, Plaintiff's request to depose Mr. Montante (as well as Frank Russo, Jr. and Joanne Russo as mentioned in Defendants' Reply), should be denied.

Further, Plaintiff once again fails to even attempt to establish excusable neglect for his failure to previously seek an extension of time, including (1) the danger of prejudice to the non-moving party; (2) the length of delay and its effect on judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. Plaintiff had ample time to depose Mr. Montante within the Scheduling Order deadline, but for whatever reason, failed to do so.

Accordingly, Defendants respectfully requests the Court deny Plaintiff's request to schedule deposition dates for non-party witness Mr. Montante, as well as Frank Russo, Jr. and Joanne Russo, and Plaintiff's motion should be quashed.

Dated: Lake Success, New York  
April 8, 2024

Respectfully submitted,  
/s/ Joseph M. Labuda  
Joseph M. Labuda, Esq.

**VIA ECF**

Stoll, Glickman & Bellina, LLP  
Attn: Rita A. Sethi, and Andrew Stoll, Esqs.  
300 Cadman Plaza West, 12th Floor  
Brooklyn, New York 11201  
(718) 852-3710 (phone)  
(718) 852-3586 (facsimile)  
rsethi@stollglickman.com  
astoll@stollglickman.com